

# DRAFT SUBJECT TO REVISIONS

January 3, 2005

## Division 2 Vested Rights

### ***Sec. 35-711 Recognition of Rights Derived From Texas Local Government Code***

#### ***(a) Purpose***

This section establishes an administrative process for the City to consider a claim that:

- (1) a project is entitled to proceed under Chapter 245 of the Texas Local Government Code;  
or
- (2) a proposed land use is entitled to proceed under Sec. 43.002(a)(2) of the Texas Local Government Code.

#### ***(b) Recognition process***

##### ***(1) Initiation***

A person who asserts a claim under subsection (a) shall file a completed application for recognition of rights with the Director of Development Services or his or her designee (the "Director") on a form provided by the Director and shall pay the application review fee established by ordinance.

##### ***(2) Review***

The Director shall review an application filed under this section and approve, deny, or make a written request to the applicant for specific additional information needed to complete the review no later than twenty (20) days after the date the application was filed. If the Director does not respond to an application within twenty (20) days, the application is denied. The Director may extend any time period established by this section for the review or appeal of an application at the written request of the applicant.

##### ***(3) Recognition of Rights Under Chapter 245 of the Texas Local Government Code***

If the Director determines the applicant has established that an application for one or more permit(s) was filed to initiate, continue, or complete a project, the Director shall issue a certificate addressed to the applicant that acknowledges and recognizes the project is entitled to vested rights under Chapter 245 of the Texas Local Government Code. The certificate shall state the filing date of the application for the permit that initiated the project, state that the City acknowledges that requirements in effect on that date shall be the sole basis for consideration of all subsequent permits required to complete the project, except as otherwise authorized by law, and shall clearly and fully describe the project for which vested rights are recognized by that certificate.

##### ***(4) Recognition of Rights under Sec. 43.002 of the Texas Local Government Code***

If the Director determines the applicant has established that a planned land use meets the criteria established by Sec. 43.002(a)(2) of the Texas Local Government Code, the Director shall issue a certificate addressed to the applicant that acknowledges and recognizes the project is entitled to vested rights under Sec. 43.002 of the Texas Local Government Code. The certificate shall state the filing date of the application for the permit required by law for the planned land use, state that the City acknowledges that its requirements may not prohibit a person from beginning to use land in the manner that was planned for the land before the 90<sup>th</sup> day before the effective date of annexation, and shall clearly and fully describe the planned land use for which vested rights are recognized by that certificate.

# DRAFT SUBJECT TO REVISIONS

January 3, 2005

## **(5) Denial**

If the Director determines that the applicant has failed to support a claim asserted under this section, the Director shall provide a written denial to the applicant and shall state the reason for the denial.

## **(c) Retention of Records**

The Director shall retain a true copy of all certificates and denials issued under this section. Copies of these documents shall be retained in accordance with state law governing document retention and shall be available to the public for review during regular business hours and as otherwise provided by the Texas Public Information Act.

## **(d) Appeal**

### **(1) Appeal to Planning Commission**

The person asserting a claim under this section may appeal a final decision on the claim by the Director to the Planning Commission by filing a written appeal with the Director no later than fifteen (15) days after the date the person is notified of the decision. The appeal shall identify the specific decision of the Director that is appealed and the reason why the decision should be reversed or modified. The Director shall place the appeal on the agenda of the Planning Commission and the Planning Commission shall hold a hearing on the appeal and make its ruling no later than forty-five (45) days after the date the appeal was filed. The decision of the Planning Commission is final on the tenth day after the vote on the decision unless a review of the decision by the City Council is requested pursuant to this subsection.

### **(2) Review by City Council**

Because significant decisions establishing or affecting city policy are most properly made by elected officials, the decision by the Planning Commission on an appeal brought under this subsection (d) is not final if City Council review of that decision is requested by:

- (a) the applicant; or
- (b) the City Manager; or
- (c) a Council Consideration Request (or an equivalent City Council agenda scheduling document) signed by the requisite number of members of the City Council to schedule a review of the decision.

A written request for City Council review shall be filed with the City Clerk no later than ten days after the date of the Planning Commission's decision. A request filed by the applicant shall be accompanied by payment of a City Council review fee in the amount established by ordinance. The City Clerk shall mail or hand-deliver copies of the request for City Council review to the applicant, the City Manager, and each member of the City Council no later than five days after the date the request is filed, and shall schedule the review of the Planning Commission's decision for a meeting of the City Council to be held no later than thirty days after the date of the Planning Commission's decision. A decision of the Planning Commission is final forty-five days after the date of the decision unless modified on or before that date by a resolution passed by the City Council. A City Council resolution enacted under this section is effective immediately upon passage and shall be a final decision of the City on an applicant's claim brought under this section.

## **(e) Variance**

The developer of a project or a planned land use who has vested rights acknowledged or recognized by official city action may request a variance from a time limit, required action, or any other term that would otherwise cause the vested rights to expire. An individual requesting a variance shall file a written

# DRAFT SUBJECT TO REVISIONS

January 3, 2005

1 application with the Director and pay a variance application fee in the amount established by ordinance.  
2 The application must identify the specific provisions for which a variance is being requested and the  
3 reasons supporting approval of the variance. The Director shall review the application and provide a  
4 written recommendation on the application to the Planning Commission no later than thirty days after the  
5 date the application was filed. If the Planning Commission fails to make a ruling on the variance no later  
6 than sixty days after the date the application was filed, the variance is denied. To grant a variance under  
7 this section, the Planning Commission must find that:

- 8  
9 (1) The applicant would suffer a hardship in the absence of a variance that is not the result of the  
10 applicant's own negligence; and
- 11  
12 (2) The applicant has been actively attempting to pursue and complete development of the project  
13 that is the subject of the vested rights; and
- 14  
15 (3) Compliance with rules and regulations passed after the recognition of vested rights would cause  
16 a substantial economic hardship to the developer that would preclude the capability of completing  
17 the project in a reasonable and prudent manner.

## 18 19 **(f) Variance appeal**

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21 A decision by the Planning Commission on a variance requested under subsection (e) of this section may  
22 be reviewed by the City Council in the same manner as a decision of the Planning Commission on the  
23 appeal of a claim brought under subsection (b) of this section, in accordance with the procedures and  
24 requirements established by subsection (d)(2) of this section.

## 25 26 **(g) Duration**

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28 A right recognized under Chapter 245 or Section 43.002(a)(2) of the Texas Local Government Code shall  
29 not extend a time period, term, or other condition established for the validity of a permit submitted for  
30 recognition or subsequently issued by the city for a project, except as may be approved by the granting of  
31 a variance under subsection (e) or (f) of this section.

## 32 33 **Sec. 35-712 Project affidavit**

### 34 35 **(a) Purpose**

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37 A project affidavit is an administrative tool to provide information necessary for the City to monitor and  
38 ensure compliance with its obligations under Chapter 245 or Section 43.002(a)(2) of the Texas Local  
39 Government Code. A person who files an application for a permit issued by the City of San Antonio may  
40 file a project affidavit with the Director on a form provided by the Director.

### 41 42 **(b) Contents of a project affidavit**

43  
44 A project affidavit shall include the following information:

- 45  
46 1. the name, address, and telephone number of the owner of the property on which project will  
47 be developed;
- 48 2. the name, address, and telephone number of the applicant, if different than the owner;
- 49 3. the legal description of the property on which the project will be developed;
- 50 4. designation of the project as a single-phase or multi-phase project, and a description of each  
51 phase of a multi-phase project;
- 52 5. the total acreage of the property on which the project will be developed;
- 53 6. the number of acres within the project proposed for development and future use as one of the  
54 following land uses, with each proposed land use identified and separated from each other  
55 proposed land use by internal boundary lines shown on a map of the project:

# DRAFT SUBJECT TO REVISIONS

January 3, 2005

- a. farm and ranch;
- b. residential;
- c. multi-family residential;
- d. office;
- e. commercial;
- f. hotel or recreation;
- g. industrial; or
- h. institutional.

7. a copy of the application for a permit filed by the applicant concurrently with the project affidavit;
8. if the requested permit is not a permit issued by the City of San Antonio, the name of the government agency with which the permit application was filed; and
9. the expiration date, if any, of the permit if issued by the government agency.

## **(c) Concurrent filing with permit**

Unless otherwise specifically provided by this Code, a project affidavit may be filed only in connection with filing an application for a permit required by the City of San Antonio or some other government agency to initiate, continue, or complete a project. The decision to file a project affidavit is optional and is not required for the consideration or approval of a permit. Unless otherwise specifically provided by this Code, a project affidavit may not be accepted for filing unless on the date the project affidavit is filed an application for a permit required to initiate, continue, or complete the project is pending with the City of San Antonio or another government agency with regulatory jurisdiction over the project.

## **(d) Filing with application for utility service commitment**

A project affidavit may be filed in connection with an application to obtain a service commitment for water, wastewater, gas, or electric utilities to initiate, continue, or complete a project. The decision to file a project affidavit is optional and is not required for the consideration or approval of a utility service commitment by the utility service provider. Failure to file a project affidavit with the City of San Antonio in connection with an application for a utility service commitment establishes a presumption that the application for a utility service commitment was not intended to initiate a specific or identifiable project and that the applicant does not intend to identify a project for purposes of this Division.

## **(e) Effect of filing project affidavit**

The Director shall issue the certificate required by subsection (b)(3) or (b)(4) of Section 35-711, as applicable, to an applicant who files a completed project affidavit.

## **(f) Failure to file a project affidavit**

Failure to file a project affidavit in connection with a permit establishes a presumption that the applicant for the permit is not initiating a continuing project, and that a permit application is sought to achieve only the action authorized by the issuance of that permit.

## **Sec. 35-713 Certain projects initiated before September 25, 1997**

### **(a) Applicability**

This section applies to a claim that a project was initiated by filing an application for a permit to initiate the project before September 25, 1997, and that before [the effective date of these proposed amendments] the City of San Antonio issued a development rights permit or a vested rights permit for that project.

### **(b) Project affidavit to confirm project as of September 24, 1997**

# DRAFT SUBJECT TO REVISIONS

January 3, 2005

As an alternative to filing a claim for recognition of rights under Section 35-711, a person may file a project affidavit described by Section 35-712 no later than *[eighteen months after the effective date of these proposed amendments]*. If a project affidavit is filed under this section, the Director shall issue the certificate required by subsection (b)(3) or (b)(4) of Section 35-711. A certificate issued under this subsection shall state that the City acknowledges that requirements in effect on September 24, 1997, shall be the sole basis for consideration of all subsequent permits required to complete the project, except as otherwise authorized by law, and shall clearly and fully describe the project for which vested rights are recognized by that certificate.

## **Sec. 35-714 Project initiated on or after September 25, 1997 and before June 4, 2001**

### **(a) Applicability**

This section applies to a claim that a project was initiated by filing an application for a permit to initiate the project on or after September 25, 1997 and before June 4, 2001.

### **(b) Application for plat**

As an alternative to filing a claim for recognition of rights under Section 35-711, a person may file a project affidavit described by Section 35-712 for land included in an application for a plat that was filed on or after September 25, 1997, and before June 4, 2001. The Director shall issue the certificate required by subsection (b)(3) or (b)(4) of Section 35-711, as applicable, to any applicant who files a completed project affidavit that describes the project initiated by the application for the plat. A project affidavit filed to satisfy the requirements of this subsection may be filed at any time.

## **Sec. 35-715 Project initiated on or after June 4, 2001 and before [the effective date of these proposed amendments]**

### **(a) Applicability**

This section applies to a claim that a project was initiated by filing an application for a permit to initiate the project on or after June 4, 2001 and before *[the effective date of these proposed amendments]*.

### **(b) Recognition of project**

A claim made under this section shall be processed pursuant to Section 35-711; provided, however, that upon request the Director shall issue the certificate required by subsection (b)(3) or (b)(4) of Section 35-711, as applicable, to any applicant who was issued a development rights permit or a vested rights permit by the City of San Antonio for that project before *[the effective date of these proposed amendments]*.

## **Sec. 35-716 Project initiated after [the effective date of these proposed amendments]**

### **(a) Applicability**

# DRAFT SUBJECT TO REVISIONS

January 3, 2005

This section applies to a project initiated after [*the effective date of these proposed amendments*] by filing an application for a permit required to initiate a project.

## **(b) Recognition of project**

The Director shall issue the certificate required by subsection (b)(3) or (b)(4) of Section 35-711, as applicable, to any applicant who files a project affidavit in accordance with Section 35-712 of this Code.

## **Sec. 35-717 Modification to project affidavit**

### **(a) Limited change in acreage proposed for previously identified use**

A project affidavit modification may be filed with the Director at any time to increase or decrease the number of acres within the project proposed for a use identified in the original project affidavit. A modification to the boundaries or acreage proposed for a use proposed in the original project affidavit is authorized if that modification does not cumulatively increase the number of acres proposed for the use by more than ten percent (10%) of the acreage proposed for that use in the original project application. The Director shall issue a revised certificate under subsection (b)(3) or (b)(4) of Section 35-711 to describe the revised project and acknowledge that the requirements in effect on the date identified on the original certificate shall be the sole basis for consideration of all subsequent permits required to complete the project, except as otherwise authorized by law.

### **(b) Minor amendment to a Master Development Plan**

A minor amendment to an approved Master Development Plan defined by Section 35-412(g)(2) of this Code that otherwise satisfies the criteria established by subsection (a) of this section does not affect a certificate issued under subsection (b)(3) or (b)(4) of Section 35-711 or the rights acknowledged and recognized by that certificate.

### **(c) Changes caused by government action**

A modification to a project that is required to comply with or conform to an action taken by a government agency does not affect a certificate issued under subsection (b)(3) or (b)(4) of Section 35-711 or the rights acknowledged and recognized by that certificate.

### **(d) All other project changes**

Any modification to a project that is not authorized by this section constitutes a new project with respect to the area of the project that is modified. Development of the remainder of a project that conforms to the original project affidavit or to a modified project affidavit authorized by this section is not a new project, and may continue to be developed in accordance with the certificate under subsection (b)(3) or (b)(4) of Section 35-711.

## **Sec. 35-718 Completion of a project**

### **(a) Project completion**

A project is complete when the underlying permit for the project expires. If there is no expiration date for that permit, a project is complete twenty years after the permit was approved; provided, however, that during that twenty year period progress towards development of the project must be equivalent to the progress required for the continuing validity of a Master Development Plan as established by Section 35-

# DRAFT SUBJECT TO REVISIONS

January 3, 2005

412(h) of this Code. If that progress is not demonstrated, the project is considered complete upon the failure of the developer to complete the requisite steps towards development after eighteen (18) months or ten (10) years, as applicable.

[OR]

A project is complete when the underlying permit for the project expires. If there is no expiration date for that permit, a project is complete twenty years after the permit was approved; provided, however, that during that twenty year period progress towards development of the project must be [*demonstrated by the expenditure of infrastructure expenses (defined in the same manner as Ordinance 86715) equal to \_\_\_\_\_ percent (\_\_\_\_ %) of \_\_\_\_\_?\_\_\_\_\_*].

## **(b) Effect of project completion**

After a project is complete, the development or redevelopment of property included in a completed project is a new project for purposes of this Code.

## **Sec. 35-719 Permit for dormant project**

### **(a) Purpose**

This section implements the authority established by Texas Local Government Code § 245.005 to establish an expiration date for a permit that does not otherwise have an expiration date.

### **(b) Applicability**

The provisions of this section apply to any permit that on May 11, 2000:

- (1) had no expiration date; and
- (2) was issued to begin or continue a project that is now dormant, as that term is defined by subsection (d) of this section.

### **(c) Expiration of a permit for a dormant project**

A permit described by subsection (b) of this section expires on May 11, 2004 (the fifth anniversary of the effective date of Chapter 245 of the Local Government Code). A permit that expires pursuant to this section extinguishes any rights established by that permit.

### **(d) Dormant project; progress towards completion of a project**

A project is dormant if there was no progress towards completion of the project before May 11, 2004. Progress towards completion of a project shall include any one or more of the following:

- (1) an application for a final plat or plan is submitted to a regulatory agency;
- (2) a good-faith attempt is made to file with a regulatory agency an application for a permit necessary to begin or continue towards completion of the project;
- (3) costs have been incurred for developing the project including, without limitation, costs associated with roadway, utility, and other infrastructure facilities designed to serve, in whole or in part, the project (but exclusive of land acquisition) in the aggregate amount of five percent of the most recent appraised market value of the real property on which the project is located;
- (4) fiscal security is posted with a regulatory agency to ensure performance of an obligation required by the regulatory agency; or

# DRAFT SUBJECT TO REVISIONS

January 3, 2005

(5) utility connection fees or impact fees for the project have been paid to a regulatory agency.

## **Sec. 35-720 Consent agreement**

### **(a) Applicability**

The provisions of this Section apply to any claim to develop property in which the applicant asserts an exemption from any provision of this Chapter or any other city codes or ordinances based on:

- (1) a legal theory recognized by Texas common law that authorizes that exemption (a "common law vested right"); or
- (2) a right claimed under the procedure established by Section 35-711 (a "statutory vested right").

### **(b) Procedure for review and approval of a consent agreement**

#### **(1) Initiation**

A person who asserts a claim under subsection (a) shall file a completed application for a consent agreement with the Director on a form provided by the Director and shall pay the application review fee established by ordinance.

#### **(2) Consent agreement in connection with a common law vested right**

An applicant for a consent agreement based on a claim asserting a common law vested right may file an application at any time before instituting judicial proceedings to assert that claim.

#### **(3) Consent agreement in connection with a statutory vested right**

An applicant under Section 35-711 may propose a consent agreement concurrently with an application filed under Section 35-711 or at any time prior to a final decision under Section 35-711.

#### **(4) Analysis and Recommendation by Director**

The Director, after consulting with the City Attorney, may recommend to the Planning Commission the approval of a consent agreement to resolve a dispute concerning a common law or statutory vested right. Before making a decision to recommend approval of a consent agreement, the Director shall require the applicant to provide credible evidence sufficient to support all required elements of a judicial finding of the common law vested right or to support a judicial finding that the applicant has a protected statutory vested right. A request for a consent agreement must include all documents that support the criteria established by this subsection. The Director may request additional relevant material prior to making his or her recommendation to the Planning Commission.

#### **(5) Denial by Director**

The Director may deny a request for a consent agreement if the Director, after consulting with the City Attorney, determines the applicant has not provided the credible evidence required by subsection (4) of this section. A denial under this subsection is a final action with no further administrative review.

#### **(6) Review and approval by Planning Commission**

The Planning Commission, in its sole discretion, may approve a consent agreement if it determines, after consultation with the City Attorney, that the applicant has provided credible evidence sufficient to support



# DRAFT SUBJECT TO REVISIONS

January 3, 2005

1 all required elements of a judicial finding of the common law vested right or to support a judicial finding  
2 that the applicant has a protected statutory vested right, and that a consent agreement to resolve the  
3 dispute is in the public interest after considering the cost and uncertainty of litigation. The decision of the  
4 Planning Commission is final on the tenth day after the vote on the decision unless a review of the  
5 decision by the City Council is requested pursuant to this subsection (b).  
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## 7 **(7) Review and approval by City Council**

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9 The decision by the Planning Commission to approve a consent agreement under this subsection (b) is  
10 not final if a City Council review of that decision is requested by a Council Consideration Request (or an  
11 equivalent City Council agenda scheduling document) signed by the requisite number of members of the  
12 City Council to schedule a review of the decision. A written request for City Council review shall be filed  
13 with the City Clerk no later than ten days after the date of the Planning Commission's decision. The City  
14 Clerk shall mail or hand-deliver copies of the request to the applicant, the City Manager, and each  
15 member of the City Council no later than five days after the date the request is filed. The City Clerk shall  
16 schedule the review of the Planning Commission's decision for a meeting of the City Council to be held  
17 no later than thirty days after the date of the Planning Commission's decision. A decision of the Planning  
18 Commission is final forty-five days after the date of the decision unless modified on or before that date by  
19 a resolution passed by the City Council. A City Council resolution enacted under this section is effective  
20 immediately upon passage and shall be a final decision of the City on an applicant's claim brought under  
21 this section.  
22

## 23 **(8) Terms and conditions of a consent agreement**

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25 A consent agreement shall be approved as to form by the City Attorney and signed by the Director and  
26 the applicant. A consent agreement shall include the following:  
27

- 28 (a) a legal description of the subject property and the names of all legal and equitable  
29 owners;  
30
- 31 (b) the duration of the consent agreement and the conditions that may result in its  
32 termination;  
33
- 34 (c) a description of the development project authorized by the consent agreement, including  
35 all proposed uses to be permitted on the property;  
36
- 37 (d) a listing of all city regulations to be applied to development of the project;  
38
- 39 (e) a finding that the consent agreement is intended to resolve a good-faith dispute  
40 concerning development rights and applicable regulations without the cost and  
41 uncertainty to both parties of litigation; and  
42
- 43 (f) a description of any other conditions, terms, restrictions, or requirements determined to  
44 be necessary for the preservation and protection of the public health, safety, or welfare.  
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46  
47 **NOTE:** The ordinance will also include appropriate amendments to the Streetscape Landscape  
48 Standards that will clearly establish that requirements for landscaping public right-of-way are **not** intended  
49 to be applied to a project that began before those landscaping standards were adopted. I will forward that  
50 language as soon as it is completed.